No. 42

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

SECURITIES AND EXCHANGE COMMISSION,

Petitioner,

v.

CAPITAL GAINS RESEARCH BUREAU, INC., and HARRY P. SCHWARZMANN.

RESPONDENTS' SUPPLEMENTAL BRIEF.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962.

No. 618.

SECURITIES AND EXCHANGE COMMISSION,

Petitioner,

v.

CAPITAL GAINS RESEARCH BUREAU, INC., and HARRY P. SCHWARZMANN.

RESPONDENTS' SUPPLEMENTAL BRIEF.

Petitioner's reply brief attempts to supply lacking proof by misquoting the Court's opinion (footnote, page 2).[1] The quotation that respondents "profited personally from the *predictable* market effect" is incorrect. What the Court said was:

> "But here the SEC's proof tends only to show that, at most, defendant Schwarzmann profited personally from the predictable market effect of his honest advice. * * *" (R. 21a)

There was no proof that a single subscriber purchased any of the stocks recommended. This is undisputed. On the subject of whether there was any proof that the

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[1] "It is not * * * fair for a lawyer knowingly to misquote * * * the language of a decision * * *.

" * * * These * * * practices are unprofessional * * *." (Canon of Professional Ethics, 22)

respondents' advice influenced the market, the panel of the Circuit Court said:

> "* * * Surely, no one could be so naive as to believe that a small advisory service with only 5,000 subscribers could by its own recommending influence cause such stocks as Union Pacific (22,000,000 shares outstanding), Continental Insurance (12,000,000 shares outstanding) and United Fruit (8,730,000 shares outstanding)[4] invariably and automatically to rise so that defendant could always sell their small holdings at a small profit. In the one instance, Hart, Schaffner & Marx, where the company had less than one million shares outstanding, the clients were told that purchases were recommended 'around the $23-$24 level' (the then current price). Such advice would hardly be consistent with an inference that it was intended thereby to raise the market price by their own clients' buying power. *Moreover, it is significant that the SEC introduced no proof that any client ever purchased any shares of the recommended securities.* The SEC's conclusion that these particular 5,000 subscribers must have rushed in, thereby creating an artificial stimulant, is wholly speculative and is at variance with common sense. * * *" (Emphasis supplied.)

"[4] Approximate figures."

The preliminary injunction was clearly denied for lack of proof. The petition should be dismissed.

Respectfully submitted,

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